RULE 80A. REAL ACTIONS

(a) Applicability. Writs of entry are abolished, and these Rules of Civil Procedure shall govern the procedure in real actions including actions in the District Court to quiet title to real estate under 14 M.R.S.A. §§ 6651-6658 and 36 M.R.S.A. § 946, except as otherwise provided in this rule.

(b) Commencement of Action; Service. An action to recover any estate in fee simple, in fee tail, for life, or for any term of years shall be commenced by complaint and service of summons as in other civil actions.

(c) Complaint. The demanded premises shall be clearly described in the complaint. The plaintiff shall declare on the plaintiff's own seizin within 20 years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the defendant. The plaintiff shall set forth the estate which the plaintiff claims in the premises, but if the plaintiff proves a lesser estate than the plaintiff has alleged, amendment may be made to conform to the proof and judgment ordered accordingly. The plaintiff need not state in the complaint the origin of the plaintiff's title, but the court may, on motion of the defendant, order the plaintiff to file a statement of the plaintiff's title and its origin. The complaint shall include any claim against the defendant for damages which have accrued at the time of commencement of the action for the rents and profits of the premises or for any destruction or waste of the buildings or other property for which the defendant is by law answerable.

(d) Answer. All defenses shall be made by answer as in other actions. The defendant may defend for a part only of the premises, and when for a part only, it shall be described in the answer with like certainty as is required in the complaint. If the defendant defends for a part only, the plaintiff shall, subject to the provisions of Rule 54(b), have judgment against the defendant on the pleadings for recovery of possession of the part not defended. If the defendant by answer alleges that the defendant has been in possession of a tract of land lying in one body for 6 years or more before the commencement of the action, that only part of it is demanded, and that the plaintiff has as good a title to the whole as to such part, proof of that fact shall defeat the action unless the complaint is amended so as to include the whole tract, which the court may allow without costs. A defendant not in possession of the premises when the action was commenced may defeat the action by disclaiming in the answer any right or title to the premises.

(e) No Abatement by Death or Intermarriage. No real action shall be abated by the death or intermarriage of either party after it has been commenced. The court shall proceed to try and determine such action, but only after such notice as the court orders has been given to all persons interested in his estate.

(f) Judgment. The judgment shall declare the estate, if any, in all or in any part of the demanded premises to which the plaintiff is entitled; and if the plaintiff shall recover judgment for title and possession of all or any part of the demanded premises, the court may order one or more writs of possession to issue in accordance with law. If either party dies before a writ of possession is executed or the action is otherwise disposed of, any money payable by the defendant may be paid by the defendant, the defendant's executor or administrator, or by any person entitled to the estate under the defendant, to the plaintiff, or the plaintiff's executor or administrator with the same effect as if both parties were living. The writ of possession shall be issued in the name of the original plaintiff against the original defendant, although either or both are dead; and when executed, it shall enure to the use and benefit of the plaintiff, or of the person who is then entitled to the premises under the plaintiff, as if executed in the lifetime of the parties.

(g) Foreclosure of Mortgage. An action under this rule may be used for the purpose of the foreclosure of a mortgage of real estate as provided by law.

Reporter's Notes
December 1, 1959

Real actions are suits of a civil nature and so within the coverage of these rules, but here also a separate rule seems required. There is no intention to change present practice except in the specific respects referred to in this Note. There is no comparable federal rule.

Subdivision (a) abolishes writs of entry and states that these rules shall apply to real actions unless otherwise provided.

Subdivision (b) provides that a real action shall be commenced by complaint and service of summons as in other civil actions. The special provisions for service in R.S. 1954, Chap. 172, Sec. 1 (amended in 1959) [now 14 M.R.S.A. § 6701] are omitted. Rule 4 seems adequately to cover the problem. The words "of freehold", which were in the statute, are omitted from the rule and the 1959 amendment of the statute because estates for years are not estates of freehold.

Subdivision (c) is a combination of R.S.1954, Chap. 172, Sec. 21 (description of premises), Sec. 2 (declaration of seizin and disseizin), Sec. 3 (setting forth of estate claimed), and Sec. 11 (recovery of damages in same action). These sections were repealed in 1959. The addition to the third sentence is designed to change the law. It appears that the effect of Sec. 4 and Sec. 8 of Chap. 172 (amended in 1959) [now 14 M.R.S.A. §§ 6901-6902] is that a plaintiff who proves a lesser estate than he has alleged can get no relief whatever. The rule allows amendment to conform to the proof in such a case. Probably such an amendment would be possible in any event because Rule 15(b) is made generally applicable by subdivision (a) of this rule, but since it is contrary to the wording of the existing statute, a specific statement seems desirable. Actually it appears that under present practice an amendment may be allowed. *Parker v. Murch*, 64 Me. 54 (1874).

The final sentence is broader than Sec. 11 (repealed in 1959), which seems to make the inclusion of a claim for damages permissive only; but it reflects the case law. *Bemis v. Diamond Match Co*., 128 Me. 335, 147 A. 417 (1929). The wording is designed to make it clear that a separate action for mesne profits or for damage to the premises may still be brought against a third person, as stated in Sec. 15 (amended in 1959) [now 14 M.R.S.A. § 6955], *Bemis v. Diamond Match Co., supra*, or against the defendant for damages accruing after the commencement of the real action. *Larrabee v. Lumbert*, 36 Me. 440 (1853).

Subdivision (d) makes it clear that defenses hitherto in abatement are now to be included in the answer. The second and third sentences are intended to correspond to R.S.1954, Chap. 172, Secs. 6 and 22 (both amended in 1959) [now 14 M.R.S.A. §§ 6801 and 7052], with the added provision for a separate judgment, subject to Rule 54(b), for the part of the premises not defended. The fourth sentence is a paraphrase of the last sentence of Sec. 21 (repealed in 1959), and is not intended to change the practice. The fifth sentence is also taken from Sec. 6 (amended in 1959) [now 14 M.R.S.A. § 6801].

Subdivision (e) is taken from R.S.1954, Chap. 172, Sec. 16 (repealed in 1959). The change in wording to the effect that the trial shall proceed "only after such notice" is to emphasize the result of *Butts v. Fitzgerald*, 151 Me. 505, 121 A.2d 364 (1956).

Subdivision (f) incorporates that part of R.S.1954, Chap. 172, Sec. 18 (amended in 1959) [now 14 M.R.S.A. § 6704], which provides for a writ of possession. The words "judgment for title and possession" do not appear in the

statute, but are taken from the form of Execution for Possession. This subdivision includes the substance of R.S.1954, Chap. 172, Secs. 39 and 40 (repealed in 1959).

The addition of subdivision (g) is to make clear that a real action may be used in the foreclosure of a mortgage of real estate.

Public Laws of 1959, c. 317 amended R.S.1954, Chap. 172, to substitute the word "plaintiff" for "demandant", and to use the word "defendant" to refer to the defending party. These changes, both conform to the terminology of the rules and serve to clear up the inconsistent senses in which the word "tenant" was used in the statute.

Perhaps some reference to the parts of the statute not incorporated in the rule is desirable. R.S.1954, Chap. 172, Secs. 4 and 8 [now 14 M.R.S.A. § 6901–6902] deal in large part with what the demandant must prove in order to win his case. To that extent they are substantive, and will remain unaffected by the rule. The procedural aspects have been changed, as discussed above. Similarly, Secs. 5 and 7 [now 14 M.R.S.A. §§ 6702, 6802] are substantive, and hence excluded.

Section 9 [now 14 M.R.S.A. § 6751] is also excluded. Insofar as it allows joinder or severance in an action of this sort, it is procedural, but in the light of *Clarke v. Hilton*, 75 Me. 426, holding that a tenant in common suing alone can recover only his own proportion of the estate, it has substantive overtones. It is not superseded or otherwise affected by these rules.

Sections 12 and 14 [now 14 M.R.S.A. §§ 6952, 6954] are obviously substantive and unaffected by the rule. The second paragraph of Sec. 18 [now 14 M.R.S.A. § 6704] is thought to be incorporated into subdivision (f) by the words "in accordance with law," insofar as it deals with what the clerk shall do, and the Court is not empowered to touch what the register of deeds shall do.

Section 20 [14 M.R.S.A. § 6956] in setting forth when betterments shall be allowed is substantive. The subsequent detailed treatment of valuation of betterments, election of the demandant to abandon, and the like are largely substantive, and to the extent that they include procedural points they are unaffected by the rules.

RULE 80B. REVIEW OF GOVERNMENTAL ACTION

(a) Mode of Review. When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency, including any department, board, commission, or officer, is provided by statute or is otherwise available by law, proceedings for such review shall, except to the extent inconsistent with the provisions of a statute and except for a review of final agency action or the failure or refusal of an agency to act brought pursuant to 5 M.R.S.A. § 11001 *et seq.* of the Maine Administrative Procedure Act as provided by Rule 80C, be governed by these Rules of Civil Procedure as modified by this rule. The complaint and summons shall be served upon the agency and all parties in accordance with the provisions of Rule 4, but such service upon the agency shall not by itself make the agency a proper party to the proceedings. The complaint shall include a concise statement of the grounds upon which the plaintiff contends the plaintiff is entitled to relief, and shall demand the relief sought. No responsive pleading need be filed unless required by statute or by order of the court, but in any event any party named as a defendant shall file a written appearance within the time for serving an answer under Rule 12(a). Leave to amend pleadings shall be freely given when necessary to permit a proceeding erroneously commenced under this rule to be carried on as an ordinary civil action.

(b) Time Limits; Stay. The time within which review may be sought shall be as provided by statute, except that if no time limit is specified by statute, the complaint shall be filed within 30 days after notice of any action or refusal to act of which review is sought unless the court enlarges the time in accordance with Rule 6(b), and, in the event of a failure to act, within six months after expiration of the time in which action should reasonably have occurred. Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but the court may order a stay upon such terms as it deems proper.

(c) Trial or Hearing; Judgment. Any trial of the facts where provided by statute or otherwise shall be without jury unless the Constitution of the State of Maine or a statute gives the right to trial by jury. The judgment of the court may affirm, reverse, or modify the decision under review or may remand the case to the governmental agency for further proceedings.

(d) Motion for Trial; Waiver. If the court finds on motion that a party to a review of governmental action is entitled to a trial of the facts, the court shall order a trial to permit the introduction of evidence that does not appear in the record of governmental action and that is not stipulated. Such motion shall be filed within 30 days after the complaint is filed. The failure of a party to file said motion shall

constitute a waiver of any right to a trial of the facts. Upon filing of a motion for trial of the facts, the time limits contained in this rule shall cease to run pending the issuance of an appropriate order of court specifying the future course of proceedings with that motion. With the motion the moving party shall also file a detailed statement, in the nature of an offer of proof, of the evidence that the party intends to introduce at trial. That statement shall be sufficient to permit the court to make a proper determination as to whether any trial of the facts as presented in the motion and offer of proof is appropriate under this rule and if so to what extent. After hearing, the court shall issue an appropriate order specifying the future course of proceedings.

(e) Record. Except where otherwise provided by statute or this Rule, it shall be the plaintiff's responsibility to insure the preparation and submission to the Superior Court of the record of the proceedings of the governmental agency being reviewed. Except where otherwise provided by this Rule, the record for review shall be submitted at the same time as or prior to the plaintiff's brief. Where a motion is made for a trial of the facts pursuant to subdivision (d) of this Rule, the moving party shall be responsible to insure the preparation and submission of the record to the court and such record shall be submitted with the motion.

The parties shall meet in advance of the time for filing the plaintiff's brief to agree on the record to be submitted. Where agreement cannot be reached, any dispute as to the record shall be submitted to the court. The record shall include the application or other documents that initiated the agency proceedings and the decision and findings of fact that are appealed from, and the record may include any other documents or evidence before the governmental agency and a transcript or other record of any hearings.

In lieu of an actual record, the parties may submit stipulations as to the record; however, the full decision and findings of fact appealed from shall be included.

(f) Review Limited to Record. Except where otherwise provided by statute or by order of court pursuant to subdivision (d) hereof, review shall be based upon the record of the proceedings before the governmental agency.

(g) Time for Briefs and Record. Unless otherwise ordered by the court, all parties to a review of governmental action shall file briefs. The plaintiff shall file the plaintiff's brief within 40 days after the date on which the complaint is filed. Any other party shall file that party's brief within 30 days after service of the

plaintiff's brief, and the plaintiff may file a reply brief 14 days after last service of the brief of any other party. However, no brief shall be filed less than 6 calendar days before the date set for oral argument. On a showing of good cause the court may increase or decrease the time limits prescribed in this subdivision.

(h) Consequence of Failure to File. If the plaintiff fails to comply with subdivision (e) or (g) of this rule, the court may dismiss the action for want of prosecution. If any other party fails so to comply, that party will not be heard at oral argument except by permission of the court.

(i) Joinder With Independent Action. If a claim for review of governmental action is joined with a claim alleging an independent basis for relief from governmental action, the complaint shall contain a separate count for each claim for relief asserted, setting forth in each count a concise statement of the grounds upon which the plaintiff contends the plaintiff is entitled to relief and a demand for the relief sought. A party in a proceeding governed by this rule asserting such an independent basis for relief shall file a motion no later than 10 days after the filing of the complaint, requesting the court to specify the future course of proceedings, including the timing of briefs and argument and the scope and timing of discovery and other pretrial proceedings including pretrial conferences. Upon the filing of such a motion, the time limits contained in this rule shall cease to run pending the issuance of an appropriate order of court. After hearing, the court shall issue such order.

(j) Discovery. In a proceeding governed by this rule, discovery shall be allowed as in other civil actions when such discovery is relevant either to the subject matter involved in a trial of the facts to which the discovering party may be entitled or to that involved in an independent claim joined with a claim for review of governmental action as provided in subdivision (i) of this rule. No other discovery shall be allowed in proceedings governed by this rule except upon order of court for good cause shown.

(k) Pretrial Procedure. In the absence of a court order, the pretrial procedure of Rule 16 shall not be applicable to a proceeding governed by this rule.

(l) Scheduling of Oral Argument. Unless the court otherwise directs, all appeals shall be in order for oral argument 20 days after the date on which the responding party's brief is due or is filed, whichever is earlier. The parties may, by agreement, waive hearing and submit the matter for decision on the record and the briefs. The clerk of the Superior Court shall schedule oral argument for the first

appropriate date after an appeal is in order for hearing, and shall notify each counsel of record or unrepresented party of the time and place at which oral argument will be heard.

(m) Review by the Law Court. Unless by statute or otherwise the decision of the Superior Court is final, review by the Law Court shall be by appeal or report in accordance with the Maine Rules of Appellate Procedure, and no other method of appellate review shall be permitted. If the Superior Court remands the case for further proceedings, all issues raised on the Superior Court's review of the governmental action shall be preserved in a subsequent appeal taken from a final judgment entered on review of such governmental action.

Advisory Committee's Notes
May 1, 2000

Subdivision (n), a transition provision governing actions filed before adoption of the revised rule in 1981 is eliminated as no longer necessary.

Advisory Committee's Notes
June 2, 1997

Rule 80B(m) is amended to clarify that an order of remand from the Superior Court to the governmental agency is not a final judgment from which an appeal lies, absent special circumstances. The amendment is not intended to change the law governing final judgments, moot issues or the preservation of issues for appeal. The amendment simply makes clear that in the ordinary case, an order of remand is not appealable and, to the extent that issues have been properly preserved throughout the course of the proceedings and are ripe for appeal when the remanded issues have been decided, the appeal from the final judgment preserves issues raised prior to the remand.

Advisory Committee's Notes
1990

Rule 80B(e) is amended to provide that a motion for trial of the facts in the Superior Court on an appeal under the rule must be accompanied by the record of the proceedings below. The purpose of the amendment is to insure that both the opposing party and the court have the opportunity to assess the need for a trial of the facts when the motion is presented.

A similar amendment is simultaneously being made to M.R. Civ. P. 80C(e).

Advisory Committee's Notes
1984

Rule 80B(1) is amended to make clear that, after the briefing of an administrative appeal to the Superior Court is completed, scheduling for oral argument is automatic and is initiated by the clerk. The new language replaces a sentence which implied that scheduling was at the discretion of the parties. The change parallels M.R. Civ. P. 75C(a).

Advisory Committee's Notes
To February 15, 1983 Order Amending Rule 80B

Rule 80B is amended simultaneously with the promulgation of Rule 80C. The two rules will now provide separate procedural paths for judicial review of local government agencies and for review of state administrative agencies subject to the Maine Administrative Procedure Act. The present amendments also contain a number of changes refining and carrying further the August 1981 amendments of Rule 80B.

Rule 80B(a) as most recently amended effective February 1, 1983, is further amended to except from the provisions of the rule proceedings to review administrative action or inaction brought pursuant to 5 M.R.S.A. § 11001 et seq. of the Administrative Procedure Act (APA). Such proceedings will now be covered by new Rule 80C. See Advisory Committee's Note to that rule. Rule 80B will continue to serve as the means for review of all other governmental action, consisting primarily of the decisions of municipal zoning and planning boards and other local agencies. A separate rule has been established for APA appeals because of the extensive role of statutory provisions in such appeals and because of wide variations in procedure and the generally greater degree of informality in local administrative proceedings. To the extent possible, consistent with those differences, the procedure provided by Rule 80B is parallel to that now established in Rule 80C. It may be anticipated, however, that experience with the two rules as presently promulgated will lead to future amendments recognizing the differing procedural needs of the two types of proceedings.

The amendment to Rule 80B(a) makes one further change. Consistent with language in Rule 80C(a), the amendment provides that the Rules of Civil Procedure govern administrative review under this rule "except to the extent

inconsistent with the provisions of a statute." This change from the former language, "except as otherwise provided by statute," is intended to emphasize that Rule 80B controls except in the case of direct functional clash between a statutory and a rule provision. Rule 80B is not ousted by the mere existence of a statutory provision covering review of a particular agency if there is no actual inconsistency between rule and statute.

For cases of administrative action or inaction within the newly limited scope of Rule 80B, Rule 80B(a) continues to provide that the rule is the exclusive procedural route for seeking any form of judicial review, whether the right to review is one "provided by statute" or is one "otherwise available by law." Many actions of local governmental agencies are reviewable under a wide variety of separate statutory provisions. For many other actions of such agencies, review "otherwise available by law" is review in the nature of that formerly available under common-law extraordinary writs such as certiorari, mandamus, or prohibition, adapted to current conditions. See generally, 2 Field, McKusick, and Wroth, Maine Civil Practice §§ 80B.1–2, 81.9-11 (2d Edn. 1970; Supp.1981); Advisory Committee's Notes to 1967 amendments of Rules 80B and 81, *id.* at 305-306, 326-329; Diesel and Carter, "M.R.Civ.P. 80B: A Procedural Vehicle for Judicial Intervention in Governmental Agency Action, in Maine State Bar Association CLE Program, Lawyering Within the Administrative Process 21, 28–33 (1982). (Of course, a plaintiff who seeks relief other than "review" of administrative action, or for whom "review" is not an adequate remedy, may have an independent action at law or in equity against the agency or its members. See further discussion in connection with amendment of Rule 80B(i) below).

The determination of when review is "otherwise available by law" remains a difficult one despite more than 15 years of practice under this provision, first adopted by amendment of Rule 80B in 1967. If the review sought is not "provided by statute," or if applicable statutory review provisions do not provide an adequate or complete remedy, appropriate review is "otherwise available by law" under Rule 80B if it is within either (1) the traditional scope of review of one of the extraordinary writs as determined by the direct application of prior authority delineating that scope of review in cases comparable to that before the court; or (2) a common-law extension of the scope of review of one of the extraordinary writs to a case not previously held to be within it. In determining whether to make such an extension, the court must address the basic policy question whether nonstatutory judicial review of executive action in the particular situation is appropriate in light of the necessary deference which a reviewing court must show, both to the proper scope to be allowed to executive action in its own sphere and to the intention of the

legislature in setting up the statutory scheme under which the executive agency operates. This deference, if not mandated by constitutional separation-of-powers principles, at least reflects a rule of judicial restraint that is an extension of those principles.

Regardless of whether review is statutory or nonstatutory, the court under Rule 80B has a broad range of remedies at its command. Thus, if statutory review is sought, the court may not only reverse and remand the matter for further consideration by the agency; it may, by incorporation of applicable provisions of the rule, grant a full range of injunctive or declaratory relief. The nonstatutory remedies in the nature of mandamus and prohibition are, in effect, mandatory and prohibitory injunctions, and declaratory relief is available as an alternative or adjunct to them. When appropriate, these forms of relief may be combined in one judgment without formal pleading or amendment. See 2 Field, McKusick, and Wroth, supra, §§ 80B.1, 80B.2; Diesel and Carter, supra, at 46-47.

Rule 80B(d) is amended to clarify the procedure by which a trial of the facts may be obtained. Under the amendment, the court must order a trial if it finds on motion that a party is en-titled to one. The time for filing a motion for trial of the facts is also changed by the amendment to run from the filing of the complaint rather than the filing of briefs, because under the simultaneous amendment of Rule 80B(g) the court may relieve a party of the obligation to file a brief in a particular case. Sub-division (d) is further amended to correct the inadvertent omission of the catch-line title and two words in the promulgation of the August 1981 amendments.

Rule 80B(g) is amended to make explicit the intention of the August 1981 amendments that briefs be required in all Rule 80B proceedings unless the court otherwise orders.

Rule 80B(i), providing a specific procedural format for actions in which claims for Rule 80B review are joined with so-called "independent actions," is new. Such joinder has always been appropriate under Rule 18. See 2 Field, McKusick, and Wroth, supra, § 80B.2, at n. 24. This unlimited right to joinder has begun to cause problems in recent years as it has become common for a party challenging administrative action not only to bring a complaint for review under Rule 80B but to allege in the complaint an independent basis for relief. Such actions allege that they are brought pursuant to Rule 80B and also allege private common-law or statutory causes of action. If an independent action is joined with an action under Rule 80B, the court may be called upon to act both in an appellate

capacity, reviewing the agency record with respect to the Rule 80B claim, and as a court of original jurisdiction, taking evidence in the independent action. On occasion a court may be asked to review the same governmental action in both capacities.

Considerable confusion concerning how the court should proceed has arisen under this practice. In the first place, the developing case law has left some doubt as to when an "independent action" does in fact lie. *Fisher v. Dane*, Me., 433 A.2d 366 (1981), and *Colby v. York Co. Commissioners*, Me., 442 A.2d 544 (1982), indicate that such an action is available only when review will not raise all issues involved or will not provide an adequate remedy. Moreover, the question is not what relief the plaintiff has actually claimed under Rule 80B, but whether under any construction of the rule the issues raised in the independent action could be litigated and the relief sought could be granted under Rule 80B, whether by statute or on some basis analogous to the former extraordinary writs discussed above under Rule 80B(a). *See also Thomas v. Amoroso,* Me., 451 A.2d 898 (1982). Yet, in *Paradis v. School Administrative District,* Me., 446 A.2d 46 (1982), a teacher was allowed to bring an independent action for damages for breach of contract against a school board even though the claim necessarily involved "review" of board action eliminating her position, because the Law Court found that her claim had an independent legal basis. *See also Ward v. School Directors, Maine School Administrative District No. 56*, Me., 384 A.2d 681 (1978) ; *see generally*, 2 Field, McKusick, and Wroth, *supra*, § 80B.2; Diesel and Carter, *supra*, at 34-40.

Given the doubt as to when an independent action lies, it is not surprising that problems have arisen in the pleading and trial of actions in which independent claims have been joined with Rule 80B claims. If the independent claim has not been properly pleaded, it may be ignored by the parties and the court altogether or until late in the proceeding. *See Flynn v. Maine Employment Security Commission,* Me., 448 A.2d 905 (1982). Even when the claim is pleaded correctly at the outset or added by amendment, confusion may arise as to the scope of discovery, the course of pretrial proceedings, the order of trial, and the scope of the judgment.

Failure to be aware of the relationship between a Rule 80B claim and an independent action may cause more serious problems. An action brought after the 30-day time for appeal provided by Rule 80B(b) has expired, though in form cast as an in-dependent action, will be time-barred unless it is truly independent under the analysis suggested by *Fisher, Colby*, and *Paradis*. Further, a separate action that is not truly independent may be barred by res judicata principles of claim preclusion if it arises out of the same transaction or series of transactions as the

Rule 80B claims and even a truly independent action may be affected by doctrines of issue preclusion (collateral estoppel) whether or not the claims are joined. See Restatement (Second) of Judgments §§ 24–28 (1982); *cf. Beegan v. Schmidt,* 451 A.2d 642 (1982).

To address the procedural concerns described above, Rule 80B(i) provides that when a Rule 80B claim is joined with an independent claim the claims must be separately pleaded in counts complying with the specificity requirements of Rule 80B(a). The party asserting such claims must file a motion for a procedural order, so that both the parties and the court will focus on the separate independent claim. After hearing, unless the court finds that the alleged independent claim is not truly independent, it will issue an appropriate order governing the future proceedings to prevent confusion concerning the capacity in which the court is acting. In fashioning an appropriate order, a range of options is available to the court, including severance of the independent count for trial under Rule 42(a). Note that order of trial in a joined proceeding may be critical because determination of any issues of fact for the claim first tried may be binding on the second claim as a matter of issue preclusion. If there is a right to jury trial upon the independent claim, that trial accordingly must be held first in order to preserve the right. *Cf.* 1 Field, McKusick, and Wroth, *supra*, § 38.2.

Rule 80B(j) is added to clarify the use of discovery when factual issues are to be tried, either as part of Rule 80B review under Rule 80B(d) or incident upon trial of an independent claim under Rule 80B(i). In such cases, discovery "relevant to the subject matter" involved in the evidentiary hearing may be had as in other actions. This standard, taken from Rule 26(a), is intended to prevent the use of joinder as a means of obtaining discovery for a fishing expedition or for harassment. As in other actions, protective orders are available to prevent abuse. Note, however, that in a Rule 80B(d) situation, the discovering party need not first establish the right to a trial. The standard is that he "may be entitled" to such a trial, which means simply a prima facie showing of entitlement if discovery is challenged by motion for a protective order. In actions other than those involving factual hearings under Rules 80B(d) or (i), discovery may be had only upon a showing of good cause.

Rule 80B(k) is added to make clear that proceedings under Rule 80B are excepted from the requirements of Rule 16 concerning pre-trial proceedings. The procedures of Rule 16 will normally be unnecessary for cases limited to a review of an agency record, unless the court issues an order permitting the introduction of

additional evidence under subdivision (d) or when an independent claim is joined under subdivision (i).

Former subdivisions (i) and (j) are renumbered as subdivisions (1) and (m) respectively.

New Rule 80B(n) provides a mechanism for implementing the August 7, 1981, amendments to Rule 80B earlier than would be possible under Rule 86(b), which provides that amendments to rules shall affect pending actions only if application of the amendments would be feasible.

Advisory Committee's Notes
February 1, 1983

Rule 80B(a) is being amended in two respects. First, the rule has been clarified to indicate that an agency is not made a party to an action merely by being served.

Second, the rule is amended to reinsert a final sentence which was inadvertently omitted in the 1976 Maine Rules of Court Pamphlet. The omission was carried forward in the subsequent edition of the rules pamphlet and in the 1977 and 1980 supplements to *Maine Civil Practice.*

Advisory Committee's Notes
1981

[Rule 80B(d)]

This amendment creates a new procedure for Rule 80B actions where a trial of the facts is appropriate.

It requires that the party seeking to introduce new evidence justify his demand for a trial of the facts at a hearing before the court. This amendment requires that a party seeking to add facts to the existing record file a motion to do so. With the motion, the party shall be required to file an offer of proof.

The court should then decide what evidence, if any, is appropriate to be heard in a trial on the facts. The court's action would, of course, be subject to any requirements of the statute or law under which review is sought, *e.g.*, 5 M.R.S.A.

§ 11006 of the Administrative Procedure Act, which limits a court's ability to go outside the record in state agency reviews.

In fashioning an appropriate order for proceeding, a wide range of options would be available for the trial judge. These include (a) combining the factual matters with the matters in which the court is sitting as an appellate court; (b) severing the matters and sitting as an appellate court in a separate proceeding from the matters which the Superior Court is being asked to try on the facts, (c) treating the matter as any other Superior Court action and thereafter ordering it scheduled for pretrial conference; or (d) remanding to the agency to take further evidence.

It should be noted that in some cases where facts outside the record below are required, the party may stipulate agreement to those facts. In such instances, the matter would be heard in accordance with normal Rule 80B procedures as amended herein.

The Maine Administrative Procedure Act basically assures that nearly all state agency decisions subject to Rule 80B review will include findings of fact and be based upon a record. For municipalities, the Freedom of Access Law, 1 M.R.S.A. § 401 *et seq*. requires public hearings, 1 M.R.S.A. § 402, and written decisions articulating reasons for decisions on permit applications, 1 M.R.S.A. § 407. Thus, it is far more likely today that there will be a formal record of municipal decisions for the Superior Court to review than has been true, even in the recent past.

Rule 80B(d), (e), (f), (g), (h) and (i).

These amendments specify procedure for a Rule 80B matter which the Superior Court is hearing in its appellate capacity.

The new subdivision (e) specifies that review will be on the record and makes the plaintiff responsible to prepare and submit the record except as 230 otherwise provided by statute or law.

In effect, this generally places responsibility on the plaintiff for preparing the record for review of municipal decisions. Record preparation for most state actions reviewed under Rule 80B is governed by 5 M.R.S.A. § 11005 requiring that the state agency prepare and file the record for review. Section 11005 also specifies the contents of the record to be filed and the time when the state agency record is to be filed.

Because of the varying circumstances regarding a record which are likely to exist at the municipal level, the procedures for submission of the record are necessarily general. As under present case law, the plaintiff or party seeking review is held responsible to assure that an adequate record is filed. However, the parties are required to meet to prepare the record. Where the parties cannot agree what should and what should not be in the record, then the matters in disagreement should be submitted. Any party which believes he may be unduly burdened by the demands of another party for inclusion of materials in the record could, as presently, petition the court for relief. Further, a party unduly burdening the record could be assessed costs at the end of the proceeding.

The record must include the application, notice of hearing or other document which initiated the agency proceeding and the decision and findings of fact of the agency. It may include any other documents before the agency and a transcript of all or portions of any hearing. In lieu of a transcript, it may include minutes or such other record of the agency hearing as is available. While this procedure may not be as precise a record preparation procedure as comports with ideal appellate practice, it would seem to be made necessary by the relative variety of municipal record keeping processes which will be encountered. In lieu of an actual record, parties are allowed to stipulate to a record.

Subdivision (f) establishes the scope of review for Rule 80B appeals, again when not otherwise provided by statute such as 5 M.R.S.A. § 11007.

Basically, as with review of District Court decisions, the Superior Court would have authority for complete review of the law and limited review of the facts to determine if the facts found were clearly erroneous or unsupported by the evidence.

Under subdivision (g) the time for filing of briefs is made identical to the time limit set for civil appeals to the Law Court and, by the simultaneous amendment of D.C.C.R. 75(a), for appeals from District Court. The court is allowed to increase or decrease the time for filing upon a showing of good cause.

Subdivisions (h) and (i) track Rule 75(c) and (d) in the present civil appeals rules. However, the present rules do recognize that the parties may, by agreement, waive hearing and submit the matter to the court on the briefs, and the time in which the matter can be in order for hearing is reduced to 20 days.

Advisory Committee's Note
April 15, 1975

A problem has arisen from the fact that this rule [80B(a)] as promulgated dispensed with the need of a responsive pleading unless required by statute or by order of the court. In these circumstances there is no way to get a default judgment in a Rule 80B action. This amendment resolves the problem by requiring a written appearance within the time for serving an answer under Rule 12(a.). Rule 12 does not require a formal appearance in the ordinary case. See Field, McKusick, and Wroth, *Maine Civil Practice* § 12.2 (2d ed. 1970). It seems justified in this situation where no responsive pleading need be filed and there is no way to determine whether a defendant wants to participate in the review proceeding unless some action on his part is required. Compare Rule 80(d). There is no set form for the appearance. All that is required is a letter or statement signed by counsel or the party, sufficient to apprise the clerk and other parties of the fact of appearance. Failure to file an appearance will be a failure to "otherwise defend," resulting in the entry of default under Rule 55(a).

Advisory Committee's Note
April 15, 1975

This amendment [to 80B(c)] makes clear that the Superior Court in reviewing governmental action has a broad range of options in shaping the relief granted. Because of the inadequacy of the record made before the governmental body, it may be appropriate for the Superior Court to remand the case for further proceedings. This procedure has been used by the Law Court in a case on report. *See Cumberland Farms Northern, Inc. v. Maine Milk Commission*, 234 A.2d 818, 823 (Me.1967). See also the earlier remand by a Superior Court justice in the same case (*id*. at 819). Thus the amendment serves only to recognize in the rule a practice already existing.

Advisory Committee's Note
December 31, 1967

The amendments to Rule 80B(a), in conjunction with those to Rule 81, are intended to make the simplified procedures of Rule 80B the sole means of judicial review of action by all governmental agencies except those for which the legislature has expressly made a different provision. In *Carter v. Wilkins*, 160 Me. 290, 203 A.2d 682 (1964), and *First Mfrs. Nat. Bank v. Johnson*, 161 Me. 369, 212 A.2d 840 (1965), the Law Court made clear that even where there were no prior

authorities permitting review on certiorari or mandamus in the precise circumstances then before the court, such review was "heretofore available by extraordinary writ" and thus appropriate under Rule 80B as it then stood if the writ were available as a matter of substantive law. See Field and McKusick, *Maine Civil Practice* § 80B.1 (Supp.1967). The amended language providing that the Rule applies when review "is provided by statute or is otherwise available by law" is intended to incorporate the results of those cases by making the provisions of Rule 80B uniformly applicable to statutory review measures and to means of review based on the former extraordinary writs. In addition, the rule will apply to such other nonstatutory means of review as the courts, in light of the abolition of the extraordinary writs as procedural devices in the amendments to Rule 81, may now feel free to develop, unfettered by the rigid confines of prohibition, certiorari, and mandamus. The addition of the language "or failure or refusal to act" is intended to incorporate the practical effect of the decision in First Mfrs. Nat. Bank that "review" under Rule 80B includes mandamus to compel action. See Field and McKusick, *Maine Civil Practice* § 80B.l (Supp.1967).

The provisions in Rule 80B(a) for service of summons and complaint under Rule 4 and for free amendment if an action is erroneously brought under Rule 80B are intended to obviate procedural confusion. It may occasionally be difficult to differentiate between proceedings under this rule and an ordinary civil action an agency, such as a suit for injunctive relief. In such cases, if the plaintiff has erroneously proceeded under Rule 80B but has some other valid right against the defendant, the action need not be dismissed. Jurisdiction will have been obtained in full compliance with Rule 4, and the amendment provisions will permit both parties to revise their pleadings in any way dictated by the altered circumstances.

The amendments to Rule 80B(b) provide a flexible time limit for review of a failure to act, since there is no precise event from which a limitation in such a case may run. In addition, the former provision for written notice is eliminated in light of the incorporation of the service requirements of Rule 4 in Rule 80B(a), and a provision for stay of the action being reviewed is added. Cf. 5 M.R.S.A. § 2451(3).

Other desirable features of the former practice under the extraordinary writ statutes are duplicated by existing provisions of the Rules made applicable generally by an amendment to Rule 80B(a). See Advisory Committee's Note to Rule 81. Since Rule 80B(a) as amended makes these Rules of Civil Procedure generally applicable, the provision of Rule 80B(c) making them applicable to trials is no longer necessary.

The last sentence of Rule 80B(d) is deleted as now obsolete or unnecessary. 14 M.R.S.A. § 5452, providing for speedy hearing of appeals in mandamus on written arguments, has been repealed by the 1967 Legislature. (1967 Pub.Laws, Chap. 441, Sec. 7). In the appropriate situation the Law Court may accord the parties a similarly expedited hearing by suspending the rules pursuant to Rule 76a(c). See Advisory Committee's Notes to Rule 76A(c) and Rule 81(c).

Reporter's Notes
December 1, 1959

This rule deals with the difficult problem of harmonizing with these rules the review of decisions of administrative agencies and officers.

Subdivision (a) provides that all review of administrative action shall be by filing a complaint with the court. Many of the statutes fail to provide any procedure whatever but simply state that "an appeal" may be taken. It seems reasonable that in all these proceedings the aggrieved party should be required to state his grievance, as some of the statutes now provide. Generally there is no statutory requirement for a responsive pleading, and there seems to be no reason for requiring one in the absence of a statutory provision. Several of the statutes provide that the agency shall certify to the court a transcript of the record before it, particularly when the review is on the agency record. It is intended that such requirements be preserved. It is also provided that the court has discretion to order a responsive pleading. There may be situations where this would make for a desirable clarification of the issues.

Subdivision (b) specifies that the time within which review may be sought shall be as provided by statute, with the proviso that, when the statute is silent as to time limits, the complaint must be filed within 30 days after the administrative action. The court may, however, enlarge the time on motion. The many statutes fixing the time for seeking review with reference to terms of court were amended in 1959 so as to provide a 30-day time limit, but the statutes providing a shorter or longer time than 30 days were left unchanged. The rule requires that written notice of the claim of review be given to the opposite party, together with a copy of the complaint. The rule does not require the service of a summons as in ordinary civil actions.

Subdivision (c) provides that these rules shall govern trial when the review provided by statute calls for a trial. Apparently a trial de novo is the customary

mode of review, although most of the statutes are not explicit on the point. When review is on the agency record (e. g., R.S.1954, Chap. 76, Sec. 13 [Repealed, 1961 Laws, c. 394, § 40; see 5 M.R.S.A. § 2451), obviously there is no occasion to resort to rules governing the trial of facts. The provision for hearing without jury unless otherwise required by the Constitution or a statute is out of an abundance of caution.

Subdivision (d) provides that the sole mode of review by the Law Court shall be by appeal in accordance with these rules.

This rule does not, of course, cover cases which go directly from the agency to the Law Court, such as public utility cases under R.S.1954, Chap. 44, Sec. 67 [now 35 M.R.S.A. 303] .

There is no special provision in the rules governing filing and certifying the record to the Law Court in such eases. It is intended, however, Rule 73(d) and (e) [now Rules 74(o) and (p)] shall by analogy apply as nearly as may be. Rule 76A [now Rules 75-76A], governing proceedings in the Law Court, also governs these cases.

It is not intended to alter the practice in reviewing workmen's compensation cases with its pro forma action by the Superior Court, R.S.1954, Chap. 31, Sec. 41 [now 39 M.R.S.A. § 103], as a prelude to review by the Law Court.